No. 09-(1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

JURISDICTIONAL STATEMENT

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

*Counsel of Record

October 5, 2009

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QUESTIONS PRESENTED

1. Whether the three-judge district court had jurisdiction to issue the "prisoner release order" pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626.

2. Whether the court below properly interpreted and applied Section 3626(a)(3)(E), which requires a three-judge court to find, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right; and . . . no other relief will remedy the violation of the Federal right" in order to issue a "prisoner release order."

3. Whether the three-judge court's "prisoner release order," which was entered to address the allegedly unconstitutional delivery of medical and mental health care to two classes of California inmates, but mandates a system-wide population cap within two years that will require a population reduction of approximately 46,000 inmates, satisfies the PLRA's nexus and narrow tailoring requirements while giving sufficient weight to potential adverse effects on public safety and the State's operation of its criminal justice system.

PARTIES TO THE PROCEEDING

Appellees are the following:

Gilbert Aviles
Steven Bautista
Ralph Coleman
Paul Decasas
Raymond Johns
Joseph Long
Clifford Myelle
Marciano Plata
Leslie Rhoades
Otis Shaw
Ray Stoderd

Intervenor-plaintiff:

California Correctional Peace Officers' Association,

Appellants are the following five defendants:

Governor Arnold Schwarzenegger
Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation
John Chiang, California State Controller
Michael Genest, Director of the California Department of Finance
Stephen W. Mayberg, Director of the Department of Mental Health

The following 146 individuals are intervenor-defendants:

Samuel Aanestad, Legislator
Anthony Adams, Legislator
Amador County Sheriff Martin Ryan
Joel Anderson, Legislator
Roy Ashburn, Legislator
Chief Probation Officer Kim Barrett

James F. Battin, Jr.*, Legislator
John Benoit, Legislator
Tom Berryhill, Legislator
Sam Blakeslee, Legislator
Police Chief Michael Billdt
Butte County Chief Probation Officer John Wardell
Butte County Sheriff-Coroner Perry L. Reniff
Calaveras County Sheriff Dennis Downum
District Attorney Ronald L. Calhoun
Chief Probation Officer Lionel Chatman
City of Alhambra Police Chief Jim Hudson
City of Atwater Police Chief Richard Hawthorne
City of Delano Chief of Corrections George Galaza
City of Delano Police Chief Mark DeRosia
City of Fremont Police Chief Craig Steckler
City of Fresno Police Chief Jerry Dyer
City of Grover Beach Police Chief Jim Copsey
City of Modesto Police Chief Roy Wasden
City of Pasadena Police Chief Barney Melekian
City of Paso Robles Police Chief Lisa Solomon
City of Roseville Police Chief Joel Neves
City of San Bernardino Police Chief Michael Billdt
City of Santa Clara Police Chief Steve Lodge
City of Sonora Police Chief Mace McIntosh
City of Vacaville Police Chief Rich Word
City of Whittier Police Chief Dave Singer

City of Woodland Police Chief Carey Sullivan
Dave Cogdill, Legislator
District Attorney Gregg Cohen
Contra Costa County Chief Probation Officer Lionel Chatman
Contra Costa County Sheriff Warren Rupf
County of San Mateo
County of Santa Barbara
County of Santa Clara
County of Solano
County of Sonoma
Paul Cook, Legislator
Dave Cox, Legislator
Police Chief Mark DeRosia
Chuck DeVore, Legislator
Del Norte County Sheriff Dean Wilson
Sutter County Sheriff Jim Denney
District Attorney Bonnie M. Dumanis
Robert Dutton, Legislator
Michael D. Duvall, Legislator
El Dorado County Sheriff Jeff Neves
Bill Emmerson, Legislator
District Attorney Bradford Fenocchio
Fresno County Chief Probation Officer Linda Penner
Fresno County Sheriff Margaret Mims
Jean Fuller, Legislator
Glenn County Sheriff Larry Jones
National City Police Chief Adolfo Gonzales
Ted Gaines, Legislator
Martin Garrick, Legislator
Police Chief Richard Hawthorne
Sheriff Pat Hedges
Dennis Hollingsworth, Legislator
Shirley Horton*, Legislator
Guy S. Houston*, Legislator
Police Chief Jim Hudson
Bob Huff, Legislator
Humboldt County Sheriff Gary Philip

Inyo County Chief Probation Officer Jim Moffet
Inyo County Sheriff William Lutze
District Attorney Edward R. Jagels
Kevin Jeffries, Legislator
Sheriff Larry Jones
Sheriff Mike Kanalakis
Rick Keene*, Legislator
Kern County Sheriff Donny Youngblood
District Attorney Robert Kochly
Doug La Malfa*, Legislator
Bill Maze*, Legislator
Lake County Sheriff Rod Mitchell
Lassen County Sheriff Steve Warren
Los Angeles County Sheriff Lee Baca
Sheriff William Lutz
Abel Maldonado, Legislator
Mariposa County Chief Probation Officer Gail Neal
Sheriff Jim Mele
Police Chief Barney Melekian
Mendocino County Sheriff Tom Allman
Merced County Sheriff Mark Pazin
Chief Probation Officer Don Meyer
Chief Probation Officer Jim Moffett
Mono County Sheriff Richard Scholl
Monterey County Sheriff Mike Kanalakis
San Joaquin County Sheriff Steve Moore
District Attorney Clifford Newell
Roger Niello, Legislator
Orange County Sheriff Coroner Michael S. Carona
District Attorney Rod Pacheco
District Attorney David W. Paulson
District Attorney Vern Pierson
Placer County Sheriff Edward N. Bonner
District Attorney John R. Poyner
District Attorney Tony Rackauckas
District Attorney Michael Ramos

District Attorney Michael Ramsey
Chief Probation Officer Brian Richart
District Attorney Todd Riebe
Riverside County Sheriff Bob G. Doyle
George Runner, Legislator
Sharon Runner*, Legislator
San Benito County Sheriff Curtis Hill
San Diego County Sheriff William B. Kolender
San Mateo County Sheriff Greg Munks
Santa Barbara County Chief Probation Officer Patricia Stewart
Santa Barbara County Sheriff Bill Brown
Santa Clara County Sheriff Laurie Smith
District Attorney Jan Scully
District Attorney Donald Segerstrom
Shasta County Sheriff Tom Bosenko
District Attorney Gerald T. Shea
Solano County Chief Probation Officer Isabelle Voit
Solano County Sheriff Gary R. Stanton
Jim Silva, Legislator
Cameron Smyth, Legislator
Police Chief Lisa Solomon
Sonoma County Chief Probation Officer Robert Ochs
Sonoma County District Attorney Stephan Passalacqua
Sonoma County Sheriff/Coroner William Cogbill
Todd Spitzer*, Legislator
Stanislaus County Chief Probation Officer Jerry Powers
Stanislaus County Sheriff Adam Christianson

Stanislaus County Sheriff's Department
District Attorney Christie Stanley
Chief Probation Officer Karen Staples
Audra Strickland, Legislator
District Attorney Gregory Totten
Van Tran, Legislator
Tehema County Sheriff Clay Parker
Ventura County Sheriff Bob Brooks
Michael N. Villines, Legislator
Mimi Walters, Legislator
Police Chief Rich Word
Mark Wyland, Legislator
Yolo County Sheriff Ed Prieto
Yuba County Sheriff Steve Durfor
Bill Berryhill, Legislator
Connie Conway, Legislator
Nathan Fletcher, Legislator
Danny Gilmore, Legislator
Curt Hagman, Legislator
Diane Harkey, Legislator
Steven Knight, Legislator
Dan Logue, Legislator
Jeff Miller, Legislator
Brian Nestande, Legislator
Jim Nielsen, Legislator

* No longer in the Legislature

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OPINIONS BELOW

The August 4, 2009 order of the three-judge district court (Reinhardt, Henderson, Karlton, J.J.) entering injunctive relief against appellants (collectively, the State) (App. 1a-256a) is unreported but is available at 2009 WL 2430820. The three-judge court's order denying the State's motion to dismiss or, in the alternative, for summary judgment (App. 257a-272a) is unreported but is available at 2008 WL 4813371. The single-judge courts' orders granting plaintiffs' motions to convene a three-judge court (App. 273a-304a) are unreported but are available at 2007 WL 2122657 and 2007 WL 2122636, respectively.

JURISDICTION

On July 23, 2007, over the State's objections, the District Courts for the Northern and Eastern Districts of California entered orders convening a three-judge district court pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(a)(3)(B), and in accordance with 28 U.S.C. § 2284. App. 10a-256a. The State contends here that the three-judge district court lacked jurisdiction to hear these cases. *Infra* at 13-18.

Following a bench trial before the three-judge court simultaneously sitting in both districts, on August 4, 2009, the court granted injunctive relief pursuant to the PLRA. App. 1a-256a. The State filed notices of appeal on September 3, 2009. App. 354a-355a. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the PLRA, 18 U.S.C. § 3626, are reproduced in the appendix (356a-358a).

STATEMENT OF THE CASE

Pursuant to the PLRA, the three-judge district court ordered injunctive relief that compels the State to cap its entire prison population at 137.5% of the institutions' design capacity within two years to address the allegedly unconstitutional delivery of medical and mental health care to specific plaintiff-classes of California inmates. By the court's own recognition, this cap—or "prisoner release order"—requires that the State reduce the population of its correctional facilities by approximately 46,000 inmates.[1] The "prisoner release order" is the first ever imposed pursuant to the PLRA over a defendant's objection. Even accounting for pre-PLRA prisoner release orders, the relief ordered by the court below is, by far, the most sweeping intrusion into a state's management of its correctional facilities in history.

This appeal presents a number of substantial questions concerning the availability and scope of "prisoner release orders" pursuant to the PLRA. Before Congress enacted the PLRA in 1996, this Court had repeatedly instructed lower courts to be extremely cautious before using their equitable powers to interfere with the legislative and executive branches' management of prisons, particularly state

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[1] Based on the evidence at the time of trial, the three-judge court estimated the prisoner reduction to be approximately 46,000 inmates. App. 235a. Because the actual prison population fluctuates over time, the estimated reduction does as well, but for simplicity we will use the 46,000 figure.

penal institutions. See, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 362-63 (1996); *Preiser* v. *Rodriguez*, 411 U.S. 475, 491-92 (1973). Cognizant of these principles, the lower courts recognized that ordering the legislative and executive branches to release prisoners or cap the population of their correctional facilities was the most intrusive form of federal court interference. See, *e.g.*, *Inmates of Occoquan* v. *Barry*, 844 F.2d 828, 843-44 (D.C. Cir. 1988). Congress nevertheless believed that further constraints on federal courts presiding over prison-conditions litigation were necessary. Therefore, it enacted the PLRA. Among other things, the PLRA permits "prisoner release orders" to be issued only by three-judge district courts, and such courts may not be convened until numerous jurisdictional prerequisites are satisfied. Additionally, three-judge courts shall not order "prisoner release" unless plaintiffs present "clear and convincing" proof that "crowding" is the "primary cause" of a violation of plaintiffs' federal rights and that "no other relief" will remedy the violation. Finally, the ability to order "prisoner release" is circumscribed by a host of nexus and narrow tailoring requirements.

This Court's full review of the questions presented by the unprecedented release order is essential to the orderly development of the law under the PLRA. A "prisoner release order," as noted, may be entered only by a three-judge court, and Congress provided this Court with sole jurisdiction over such appeals. Thus, any summary affirmance would give the three-judge court's order substantial and unwarranted influence. The decision below presents a stark break from Congress's design in the PLRA and this Court's jurisprudence regarding prison conditions and federal

court interference with the states' governance. Accordingly, probable jurisdiction should be noted.

A. Statutory Background

Enacted in 1996, the PLRA, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 (1996), defines the remedial powers of the federal courts over conditions of confinement. See 18 U.S.C. § 3626. Any prospective relief ordered under the statute must be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." *Id.* § 3626(a)(1)(A); see also *id.* (relief may "extend no further than necessary to correct the violation of the Federal right of *a particular plaintiff or plaintiffs*") (emphasis added). Moreover, in considering whether such relief is appropriate, a court "shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

The PLRA further limits the circumstances under which a federal court is authorized to enter a "prisoner release order," one type of prospective relief, as a remedy for violations of plaintiffs' federal rights. *Id.* § 3626(a)(3); see *id.* § 3626(g)(4) ("prisoner release order" is "any order ... that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison"). Such an order may be entered only by a properly convened three-judge district court. *Id.* § 3626(a)(3)(C). A three-judge district court lacks jurisdiction to enter such an order

> unless—(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right

> sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

Id. § 3626(a)(3)(A).

If jurisdiction exists, a three-judge court "shall enter a prisoner release order only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." *Id.* § 3626(a)(3)(E).

B. Factual Background

1. The appeal involves two class actions, *Plata* v. *Schwarzenegger* and *Coleman* v. *Schwarzenegger*, concerning allegedly unconstitutional prison health care conditions. *Plata* and *Coleman* were in their remedial phases before the Northern District (Henderson, J.) and the Eastern District (Karlton, J.) of California, respectively, prior to the three-judge district court proceedings from which this appeal is taken. *Plata*, which was filed in 2001, concerns the constitutional adequacy under the Eighth Amendment and sufficiency under the Americans with Disabilities Act and the Rehabilitation Act of medical care provided to California's adult inmates with "serious medical conditions." See generally Am. Compl., *Plata*, No. C01-1351-TEH (N.D. Cal. filed Aug. 20, 2001) (Docket No. 20). *Coleman*, which originally was filed in 1990, involves allegations that the mental health care services provided to California's inmates with serious mental disorders are constitutionally inadequate. See generally Am. Compl., *Coleman*, No. CIV-S-90-0520-LKK-JFM (E.D. Cal. filed Jul. 25, 1991) (Docket No. 61).

In *Plata*, the parties negotiated a settlement of all plaintiffs' claims and entered into a stipulation for injunctive relief that was approved by Judge Henderson on June 13, 2002. See *Plata* v. *Davis*, No. C01-1351-TEH (N.D. Cal. June 13, 2002) (Docket No. 68). After several years of remedial efforts designed "'to provide only the minimum level of medical care required under the Eighth Amendment,'" App. 16a, in October 2005, Judge Henderson concluded that the prison medical system still did not meet constitutional standards, see *id.* at 14a. The court therefore took the extraordinary and unprecedented step of placing the medical health care delivery system of the California Department of Corrections and Rehabilitation ("CDCR") in a Receivership. *Id.* Judge Henderson concluded that "'[d]espite the best efforts of [the State],'" *id.* at 22a, *inter alia*, the inmates lacked access to care and specialty services, and that the CDCR: had "serious personnel problems," "was incapable of recruiting qualified personnel," "lacked medical leadership" and necessary medical equipment, had not developed or implemented tracking systems for inmates with chronic care needs, and suffered from "'a culture of non-accountability and non-professionalism.'" *Id.* at 27a-28a.

The Receiver's appointment was effective on April 17, 2006. App. 29a. The Receiver was given broad authority to manage the California prison medical care in order to "'provide[] constitutionally adequate medical care to all class members as soon as practicable.'" *Id.* at 30a. Just months later, however, plaintiffs filed a motion to convene the three-judge court to consider whether a "prisoner release order" should issue. See Pls.' Mot., *Plata*, No. C01-1351-TEH (N.D. Cal. filed Nov. 13, 2006) (Docket No. 561).

In *Coleman*, following a 1994 trial, the district court concluded that the mental health care provided to the class members violated the Eighth Amendment. App. 31a. The court found that the mental health care delivery system was inadequate in numerous respects, including its screening mechanisms, access to appropriate care, medical record system, administration of psychotropic drugs, staff competence, and suicide prevention. *Id.* at 33a-35a. Therefore, in December 1995, the court appointed a special master to oversee implementation of injunctive relief. See *id.* at 36a. In 1997, the court approved plans developed by the Special Master, and over the following years, "defendants continued to work with the Special Master to implement and revise" those plans. *Id.* at 37a. In March 2006, the *Coleman* court approved revised plans and ordered their implementation. *Id.* at 37a-38a. Eight months later, the *Coleman* plaintiffs moved to convene a three-judge court. See *id.* at 304a.

2. Over the State's objections, on July 23, 2007, the *Plata* and *Coleman* courts granted plaintiffs' motions to convene a three-judge court. See App. 273a-304a.[2] To "avoid[] the risk of inconsistent judgments," Judges Henderson and Karlton each recommended that the two different cases be heard by the same three-judge court. *Id.* at 286a, 304a. Then-Chief Judge Schroeder approved that request, and seated Circuit Judge Reinhardt to round out the panel pursuant to 28 U.S.C. § 2284. See *Coleman/Plata*, Nos. CIV-S-90-0520-LKK-JFM-P et al., slip op. at 1 (E.D. Cal./N.D. Cal. July 26, 2007) (*Coleman*, Docket

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[2] The State appealed the orders convening the three-judge court, but the Ninth Circuit dismissed the appeals for lack of jurisdiction. *Coleman* v. *Schwarzenegger*, No. 07-16361, 2007 WL 2669591, at *1 (9th Cir. Sept. 11, 2007) (per curiam).

No. 2328). Therefore, as convened, the three-judge court failed to provide as meaningful a check as Congress intended on the individual district judges' exercise of power over prison release. Cf. 141 Cong. Rec. S14407, S14414 (daily ed. Sept. 27, 1995) (Sen. Dole) (noting that the PLRA would limit the power of any federal judge to "'single-handedly'" order release); Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. Mich. J.L. Reform 79, 120 (1996) (noting that "[t]he drafters of the original legislation" authorizing three-judge district courts "thought three judges would be more sensitive to issues of federalism").

The State moved to dismiss the three-judge proceedings for lack of jurisdiction and, in the alternative, moved for summary judgment. On November 3, 2008, the three-judge court denied the State's motion. App. 272a.

Trial before the three-judge court commenced on November 18, 2008. During the trial, which continued intermittently throughout December 2008 and February 2009, the court prohibited defendants from introducing evidence "relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" App. 78a n.42. Thus, the State was limited in its ability to show the advances that been made under the Receivership that had been in effect for less than a year in *Plata* and could not prove how it was implementing the *Coleman* Special Master's latest recommendations. Nor did the State have a meaningful opportunity, prior to the three-judge proceedings, to execute Assembly Bill 900, which the Governor signed into law in 2007 and authorizes, *inter alia*, eight billion dollars for the construction of

additional correctional facilities. See *id.* at 146a-150a.

Nonetheless, following trial, the court answered the fundamental "question of law" whether crowding was the "primary cause" of the underlying violations of plaintiffs' federal rights. App. 126a n.55 (internal quotation marks omitted). It held that crowding is the primary cause and that no other relief can remedy the violations. See *id.* at 78a-165a; see also 18 U.S.C. § 3626(a)(3)(E). The court therefore granted plaintiffs' request for injunctive relief. It issued a prisoner release order mandating that the system-wide population of California's prisons be capped at 137.5% of the design capacity within two years, *e.g.*, App. 169a, and estimated that the population would need to be reduced by 46,000 inmates (over 25% of the 170,000 inmates in the system), *id.* at 235a, 52a. The order required the State to provide the court, by September 18, 2009, with its plan for doing so. *Id.* at 255a, 235a.

The court concluded that a "prisoner release order" was appropriate notwithstanding its findings that other causes continue to impair plaintiffs' federal rights and that the population cap, even once fully implemented, *would not remedy* the violations to plaintiffs' rights. App. 134a, 143a. The court also concluded that the population cap satisfies the PLRA's requirements that any "prospective relief" be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right [of a particular plaintiff or plaintiffs], and is the least intrusive means necessary to correct the violation of a federal right," and that "substantial weight" be given "to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A); see App. 185a-255a.

The court reached this conclusion despite its recognition that the relief imposed "extends further than the identified constitutional violations" and "is likely to affect inmates without medical conditions or serious mental illnesses." App. 172a. Moreover, it selected the 137.5% figure solely because it was "halfway between the cap requested by plaintiffs and the wardens' estimate of the California prison system's maximum operable capacity absent consideration of the need for medical and mental health care." *Id.* at 184a. Additionally, the court acknowledged that absent effective rehabilitation programs for released inmates, studies showed that a prisoner release of this magnitude was likely to cause a statistically significant increase in crime. *Id.* at 241a-248a; see also *id.* at 185a-233a (finding no adverse impact to the criminal justice system primarily because the court concluded that "crowding" already had adverse effects on the system).

3. On September 1, 2009, the State moved the three-judge court for a stay pending disposition of an appeal to this Court pursuant to 28 U.S.C. § 1253. On September 3, 2009, the State timely noticed this appeal. App. 354a-355a. On the same day, the three-judge court denied the State's motion for a stay. *Id.* at 305a-311a. On September 4, 2009, the State filed an application for stay pending appeal with Justice Kennedy. On September 11, 2009, the application was denied. *Schwarzenegger* v. *Coleman*, No. 09A234, 2009 WL 2915066, at *1 (U.S. Sept. 11, 2009).

Therefore, on September 18, 2009, the State filed a population reduction plan with the three-judge court. App. 312a-353a. Without waiving its challenges to the three-judge court's jurisdiction to impose that

order or the order's lawfulness, *id.* at 315a, the State's plan, with additional legislative enactments, proposes to meet or bring the population below the 137.5% cap within five years, *id.* at 317a, having determined that it could not safely cap the population at 137.5% of design capacity within two years, *id.*

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents several legal questions of substantial importance regarding the prerequisites for issuing a "prisoner release order" pursuant to the PLRA, and it does so in a context that has serious consequences for public safety and our federal system. The substantial nature of these issues and the importance of the factual context is immediately clear because Congress vested this Court with exclusive jurisdiction to review any injunctive relief issued by a three-judge district court pursuant to the PLRA, including "prisoner release orders." Thus, unless this Court notes probable jurisdiction, the State of California will obtain no review at all of an unprecedented order requiring a prisoner reduction of approximately 46,000 inmates.

Moreover, a summary affirmance in this case will have precedential value in the nascent interpretation of the PLRA. See *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975) ("[T]he lower courts are bound by summary decisions by this Court '"until such time as the Court informs [them] that [they] are not."'") (alterations in original). Full review of the questions presented is exceptionally important because of the lower court's lax interpretation of the PLRA's prerequisites to ordering "prisoner release" and its readiness to micromanage the affairs of state correctional facilities.

Even before the PLRA was enacted, courts recognized that population caps represented the highest level of federal court interference with the management of prisons and thus a challenge for Our Federalism. See, *e.g.*, *Taylor* v. *Freeman*, 34 F.3d 266, 268-70 (4th Cir. 1994); *Occoquan*, 844 F.2d at 842-43 ("[A] population limit ... directly implicates decisions with which the political process is charged."); see also *Lareau* v. *Manson*, 651 F.2d 96, 111 (2d Cir. 1981) (Friendly, J., concurring in part and dissenting in part) ("the inflexible population cap imposed ... reminds me of the old saw, 'If the ship is leaking, sink it.'"). In enacting the PLRA, Congress sought to impose even greater restraints on federal court interference with prison conditions. See *Woodford* v. *Ngo*, 548 U.S. 81, 93 (2006); *Miller* v. *French*, 530 U.S. 327, 347 (2000); *Taylor* v. *United States*, 181 F.3d 1017, 1027 (9th Cir. 1999) (en banc) (Wardlaw, J., dissenting) ("When Congress enacted the PLRA, it sought to oust the federal judiciary from day-to-day prison management."). The Act takes special aim at prisoner release orders and population caps like that imposed here. See *Castillo* v. *Cameron County, Tex.*, 238 F.3d 339, 348 (5th Cir. 2001); *Gilmore* v. *California*, 220 F.3d 987, 998 & n.14 (9th Cir. 2000).[3]

If allowed to stand, the order below will interfere with the State's control of its prisons and the operation of its criminal justice system. Moreover, it will limit California's ability to set political priorities and to fund them, and will open the door to the widespread infringement of state prerogatives in the

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[3] *See also* 141 Cong. Rec. at S14414 (Sen. Dole) ("Perhaps the most pernicious form of judicial micromanagement is the so-called prison population cap."); *id.* at S14418 (Sen. Hatch); H.R. Rep. No. 104-21, at 9 (1995).

future. The PLRA, however, was enacted to prevent such damage to principles of federalism. Under the lenient approach to jurisdiction and the statutory prerequisites employed below, Congress's intent to make a "prisoner release order" the remedy of "last resort" will be subverted. This Court should act now to prevent that outcome by noting probable jurisdiction over the appeal.

I. THE THREE-JUDGE COURT LACKED JURISDICTION TO ENTER THE "PRISONER RELEASE ORDER."

The three-judge court's jurisdiction to consider a prisoner release order presents substantial questions for this Court's review. In fact, the PLRA's jurisdictional requirements were not satisfied.

Pursuant to the PLRA, only a three-judge district court may issue a prisoner release order. 18 U.S.C. § 3626(a)(3)(B). But, a three-judge court lacks jurisdiction to consider a prisoner release order unless plaintiffs demonstrate that

> (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order, and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

Id. § 3626(a)(3)(A); see *id.* § 3626(a)(3)(C); *accord* App. 274a, 283a-285a.

As demonstrated below, the three-judge district court plainly was not properly convened. The *Plata* court failed to allot the State a reasonable amount of time to effectuate the Receiver's recent proposals, despite the Receiver's conviction that his actions would remedy the alleged constitutional violations.

The *Coleman* court also failed to provide the State a meaningful opportunity to comply with its most recent orders related to the Special Master's recommendations. Thus, the *Plata* and *Coleman* courts' orders convening a three-judge court with jurisdiction to consider a prisoner release order in these circumstances present substantial legal questions. As this Court has made clear in cases involving other aspects of the PLRA, strict compliance with the PLRA procedural requirements is essential to fulfilling Congress's goal of having fewer, more substantial suits regarding prison conditions litigated in federal court. See, *e.g.*, *Jones* v. *Bock*, 549 U.S. 199, 202-04 (2007); *Porter* v. *Nussle*, 534 U.S. 516, 523-25 (2002).

1. In *Plata*, the Northern District of California did not give the State a reasonable amount of time to comply with its orders requiring less intrusive relief before ordering the three-judge proceedings. There, the court appointed a receiver effective April 17, 2006 to take comprehensive control of CDCR's medical care system. The State immediately began working with the Receiver to address the plaintiff class's complaints. The Receiver issued his first bi-monthly report on July 5, 2006 in which he stated that his "mission[] to bring the level of medical care ... up to constitutional requirements will be done." Receiver's First Bi-Monthly Report at 33:1-3, http://www.cprinc.org/docs/court/Receiver1stBiMoR070506.pdf. He filed the second bi-monthly report on September 19, 2006, noting the "implement[ation] [of] numerous immediate and/or short term measures" designed to fulfill his mission, Receiver's Second Bi-Monthly Report at 48:25-27, http://www.cprinc.org/docs/court/Receiver/2ndBiMoR091906.pdf, and outlining the items upon which he would focus over the next 60

days, *id.* at 49:6-51:4. On November 13, 2006, the Receiver requested an extension of time in which to submit a detailed Plan of Action, explaining that it was premature to "develop[] a final corrective action plan" or "final, permanent remedial programs." Receiver's Mot. Extension at 2:2-4, 2:16-17 (capitalization omitted), *Plata*, No. C01-1351-TEH (N.D. Cal. Nov. 13, 2006) (Docket No. 559). On the same day, plaintiffs moved to convene the three-judge court.

Before ruling on the motion to convene, on December 19, 2007, Judge Henderson granted the Receiver's extension request. The Receiver filed the Plan of Action on May 10, 2007. It contemplated several years of efforts to remedy the claimed violations to the class. Although the Receiver attested that the "Plan of Action will work" and that it was "simply wrong" to think that "population controls will solve California's prison health care problems," App. 282a (quoting Receiver's Report), the court granted plaintiffs' motion to convene a three-judge court to consider a prisoner release order, *id.* at 278a-281a.

Notwithstanding its acknowledgement of Section 3626(a)(3)(A)(ii) and admission that the Receiver "has made much progress," App. 279a-280a, the court squarely held that it was not "require[d] ... to wait more time, potentially years, to see whether the Receiver's plans will succeed or fail," *id.* at 281a. The court therefore short-circuited the process it had set in motion. The court offered only the excuse that the Receiver's progress since his appointment was outweighed by what the court deemed to be insufficient progress in the years preceding the appointment. See *id.* at 280a-281a.

2. Similarly, in *Coleman*, although the district court approved new remedial plans and also required

the State to submit new plans to the Special Master, see *Coleman*, No. CIV S-90-0520-LKK (E.D. Cal. Mar. 3, 2006) (Docket Nos. 1772, 1773), the plaintiffs moved to convene a three-judge court just eight months later. Among other things, the March 2006 order required the State to submit plans for: reducing the rate of vacant psychiatrist positions across the CDCR; expanding mental health staff; providing sufficient beds for mentally ill inmates; and addressing suicide prevention. *Id.*, Docket No. 1772.

Consistent with the order, the State submitted and the court approved a stipulated process for evaluating psychiatrists. *Id.*, Docket No. 1951. The State submitted and implemented bed plans throughout summer 2006. See, *e.g.*, *id.*, Docket No. 1950. Additionally, it submitted a plan to address suicide trends in October 2006, *id.*, Docket No. 1990, and agreed to adopt many of plaintiffs' recommendations regarding that plan in December 2006, *id.*, Docket No. 2061. Furthermore, in June 2006, the *Coleman* court began ordering the State to coordinate its compliance efforts with the then-newly appointed *Plata* Receiver. See Decl. of Lisa Tillman at 3:10-13, *Coleman*, No. CIV-S-90-0529-LKK (E.D. Cal. Dec. 4 2006) (Docket No. 2063); *accord Coleman*, No. CIV-S-90-0529-LKK (E.D. Cal. June 8, 2008) (Docket No. 1834); see also, *e.g.*, *Coleman*, CIV-S-90-0529-LKK, slip op. at 3:14-16 (E.D. Cal. Oct. 20, 2006) (requiring coordination of construction) (Docket No. 1998); *Coleman/Plata*, Nos. CIV-S-90-0520-LKK et al., slip op. at 2:20-23 (E.D. Cal./N.D. Cal. Feb. 26, 2008) (same) (Docket No. 2696). Moreover, the State undertook all of these measures against the backdrop of the court's recognitions that: "[t]hrough 2005, the record ... reflected slow but evident progress toward constitutional compliance"; "some prisons in Califor-

nia came into sufficient compliance with the provisionally approved remedial plans"; and "defendants managed, through the use of aggressive recruitment and retention strategies, salary increases, and use of contract staff, to keep the vacancy rate among mental health staff at a nearly acceptable level." App. 293a.

Nevertheless, "[i]n spite of the commendable progress" made by the State in those regards, App. 294a, the court convened a three-judge court because it found that certain reversals of progress had occurred, *id.* at 295a-296a. Judge Karlton did so even as the State was working with the Special Master and plaintiffs to achieve the goals of the March 2006 order because, similar to Judge Henderson's reasoning, "[i]t has been almost twelve years since this court found widespread violations of the Eighth Amendment ... [and] Defendants have had more than sufficient time to comply with the mandate required by the court's 1995 order and the numerous orders issued since then." *Id.* at 297a.

3. Both single-judge courts' approaches are irreconcilable with even pre-PLRA case law. See *Women Prisoners* v. *Dist. of Columbia*, 93 F.3d 910, 929 (D.C. Cir. 1996) (reversing imposition of a population cap and explaining "[t]he court ... should have determined the constitutional propriety of a population cap *at the margin*—that is to say, *after its instructions concerning health and safety measures had been complied with*") (second emphasis added). Indeed, the lower courts' views were to prevail, any single-judge court would have license to find that insufficient progress at an earlier point in time vitiated any obligation to ensure that "a reasonable amount of time to comply" with more recent orders had been afforded. Cf. *Casey*, 518 U.S. at 363 & n.8.

Sometimes less intrusive measures to address constitutional violations take time. Under the PLRA, Congress plainly intended that those measures be given an ample opportunity to succeed before a three-judge court is convened to entertain much more drastic, intrusive remedies. In this case, the single-judge courts acted prematurely and therefore the three-judge court lacked jurisdiction.

II. THE COURT'S INTERPRETATION OF THE "PRIMARY CAUSE" REQUIREMENT IS CONTRARY TO THE PLRA AND WOULD GREATLY EXPAND THE AVAILABILITY OF "PRISONER RELEASE ORDERS."

A properly convened three-judge court may issue a prisoner release order "only if [it] finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation." 18 U.S.C. § 3626(a)(3)(E). The three-judge court recognized that the primary cause determination is "'a question of law.'" App. 126a n.55. The court's interpretation of Section 3626(a)(3)(E) presents substantial questions for review.

In finding that overcrowding is the primary cause of health care violations, the court below did not give the word "primary" its natural meaning; it found overcrowding a primary cause of the medical and mental healthcare inadequacies simply because it contributed to those problems. That interpretation disserves Congress's purposes and does violence to the statute's plain meaning. Moreover, in concluding that even capping the overall prison population at the level required by the court would not remedy the violation of plaintiffs' federal rights, the court below effectively nullified subsection (E)(ii)'s requirement that "no other relief ... will remedy the violation of the

Federal right." Finally, the court's entire analysis of Section 3626(a)(3)(E) was artificial because it did not analyze, and appellants were prohibited from developing and introducing evidence about, the "current and ongoing" nature of the alleged federal violations. By failing to ensure that the current conditions in the State's prisons meets Section 3626(a)(3)(E)'s requirements, the court's order lacks sufficient foundation.

1. Congress did not define the statutory phrase "primary cause," nor does the legislative history address it. See App. 79a & n.43. Although the three-judge court purported to accept the State's interpretation of the requirement, see *id.* 78a ("the cause that is 'first or highest in rank or importance; chief; principal'"), it did not in fact apply that interpretation. In finding that crowding was the "primary cause" of the alleged constitutional violations, the court below used a standard that made crowding little more than a *contributing cause* of the violations. See *Black's Law Dictionary* (9th ed. 2009) (defining "contributing cause" as "[a] factor that—though not the primary cause—plays a part in producing a result").

The court recognized that myriad causes for the alleged constitutional violations exist and that many of them pre-date the crowding now at issue. See App. 16a-17a, 31a-52a, 104a-126a; see also *Plata*, No. C01-1351-TEH, 2005 WL 2932253, at *28 (N.D. Cal. Oct. 3, 2005); *Plata*, No. C01-1351-TEH, 2005 WL 2932243, at *1 (N.D. Cal. May 10, 2005). And, the court acknowledged that curing the crowding would not remedy the alleged constitutional violations because the other, independent causes would

continue to produce constitutional injury. See App. 134a, 143a.[4]

In these circumstances, crowding plainly is not the primary cause of the alleged constitutional violations. Any reasonable construction of "primary cause" requires that crowding be the proximate and "but for" cause of the complained-of federal violations. See *Rocco* v. *Lehigh Valley R.R.*, 288 U.S. 275, 278-80 (1933) (discussing "primary" and "proximate" causation in the context of Federal Employers' Liability Act); *id.* at 280 (suggesting that the "primary cause" of an accident, in contrast to a "concurrent cause," would "preclude a finding" that the negligence of others was actionable); *The G.R. Booth*, 171 U.S. 450, 460-61 (1898) (discussing "proximate" and "primary causation"); *Metro. Pittsburgh Crusade for Voters* v. *City of Pittsburgh*, 964 F.2d 244, 251 (3d Cir. 1992) (acknowledging that a "primary cause" encompasses "but for" and "proximate" causation, and that such standards are "significantly more stringent than [a] 'material contributing factor' test") (citations omitted).[5]

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[4] Specifically, the court below found that "while other factors contribute to the unconstitutional state of the California prisons' medical and mental health care system, and while there are other steps the state must take to meet its constitutional obligations, clear and convincing evidence establishes that crowding is the primary cause of the constitutional violations." App. 143a.

[5] *See also, e.g.*, *Shyface* v. *Sec'y, HHS*, 165 F.3d 1344, 1350-53 (Fed. Cir. 1999) (holding that the Vaccine Act, which fails to define term "caused," required plaintiff to show that triggering event was a "but for" cause and a "substantial factor" in bringing about injury); *Magayanes* v. *Terrance*, 542 F. Supp. 28, 29 (N.D. Ill. 1982) (analogizing "primary" and "but for" cause), *aff'd*, 720 F.2d 682 (7th Cir. 1983); *First Nat'l Bank of Akron* v. *Cann*, 503

Indeed, in other contexts, the courts have recognized that meeting a "contributing factor" or even "substantially contributing cause" requirement presents a much lower burden than demonstrating a "primary cause." *Hawkins* v. *Dir., Office of Workers Compensation Programs*, 907 F.2d 697, 705 n.12 (7th Cir. 1990) (Black Lung Benefits Act); *Borras* v. *Sea-Land Serv., Inc.*, 586 F.2d 881, 885-86 (1st Cir. 1978) (Jones Act).

At the very least, if crowding is the primary cause, eliminating the crowding should largely extinguish the alleged constitutional violations. But, the three-judge court recognized that even absent the crowding, the plaintiffs' federal rights still would have been and would continue to be violated. This illustrates that the court's interpretation of the phrase "primary cause" is inconsistent with and undermines the PLRA.

Moreover, this interpretation nullifies the statute's additional requirement that "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E)(ii). That provision assumes that by eliminating "crowding," the prisoner release order will do what lesser relief could not: that it will "remedy the violation of the Federal right." If overcrowding is the primary cause of the constitutional violation, then it stands to reason that eliminating overcrowding necessarily will undo all or virtually all of the constitutional harm. But the record is clear that this is not so.

Before the three-judge court was convened, *Coleman* and *Plata* were not litigated as cases about crowding. The underlying alleged constitutional

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F. Supp. 419, 441 (N.D. Ohio 1980) (same), *aff'd*, 669 F.2d 415 (6th Cir. 1982).

violations involved the delivery of medical and mental health care. The thrust of orders and consent decrees entered by the single-judge courts over the years reflected that reality by directing relief, not at crowding, but at problems such as recruitment and retention of qualified personnel, medical leadership, medical equipment, screening systems, systems to track patients with needs, record keeping, and institutional culture. See, *e.g.*, App. 16a-17a, 22a-23a, 33a-36a. The *Coleman* Special Master, the *Plata* Receiver, and plaintiffs' own expert agreed that even if the crowding is remedied, these pre-existing and underlying problems will continue to cause the alleged constitutional violations.[6] The *Coleman* Special Master, for instance, concluded that "even the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program populations that would remain undiminished" and that releasing 50,000 inmates would not bring the staffing resources into compliance. *Id.* at 157a-158a

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[6] *See, e.g.*, Deposition of Dr. Shansky at 61:14-24 (E.D. Cal./N.D. Cal. Dec. 10, 2007) ("Q. If the only improvement that was made in the next two years is ... there are 40,000 less inmates, no other changes other than the current status quo, would CDCR have a systemwide constitutionally adequate medical care delivery system?... A. The answer is no."); Receiver's Report re: Overcrowding at 42:24-43:1, *Plata*, No. C01-1351-TEH (N.D. Cal. filed May 15, 2007), http:///www.cprinc.org/docs/court/ReceiverReportReOvercrowding451507.pdf ("[T]hose who believe that the challenges faced by the Plan of Action are uncomplicated and who think that population controls will solve California's prison health care problems, are simply wrong."); Receiver's Turnaround Plan of Action at ii-iv, 1-20, *Plata*, No. 3:01-cv-1351-TEH (N.D. Cal. filed June 6, 2008) (Docket No. 1229) (primarily focusing on need for systemic improvements and changes to the institutional culture, not overcrowding).

(alteration omitted).[7] Moreover, plaintiffs' expert testified that CDCR could provide constitutionally adequate care for more than 172,000 inmates if other reforms were successfully implemented. See Shansky Dep. at 144:3-12.

Although the record belies the notion that crowding is the "primary cause" of what plaintiffs allege as constitutional violations, this is not to deny that crowding can exacerbate the deficiencies that caused the constitutional violations. But, at best, this makes crowding a secondary factor and an insufficient basis for a prisoner release order. See, *e.g.*, App. 299a ("*By early 2006*, the impact of severe prison overcrowding on the remedial efforts in this case was *becoming evident* in the record.") (emphasis added). The lower court's interpretation of the "primary cause" requirement, however, would allow a three-judge court to order prisoner release, as here, whenever it was frustrated with the speed or ability of less intrusive relief to remedy the violations of federal rights—even though the federal violations would continue unabated after the prisoner release occurred. See *id.* at 134a, 143a. This fails to give meaning to Congress's intent to make prisoner release "'the remedy of last resort'" under the PLRA. *Id.* at 73a. To do so, the requirements of Section 3626(a)(3)(E) must be interpreted in a manner that

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[7] Without explanation, the three-judge court brushed aside the "Special Master's statement about 100,000 inmates [as] somewhat hyperbolic." App. 158a. And, although the court found that the Special Master's comment "about 50,000 inmates more nearly approximates the remedy we deem appropriate," *id.*, it failed to heed his point that even a more considerable population reduction would not remedy the staffing deficiencies that long have been central to the violations at the heart of this litigation.

permits states every opportunity to remedy alleged federal violations by implementing measures, as here, sufficient to address the federal violations *without ordering a state to release prisoners*. See *supra* at 21-23 & n.6.

2. Regardless of how Section 3626(a)(3)(E) is interpreted, the three-judge court's findings cannot be sustained because it precluded the State from "introduc[ing] ... evidence relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" App. 78a n.42; see *id.* at 77a (declining to "evaluate the [S]tate's continuing constitutional violations"). The court reasoned that there was no need to consider these issues because the single-judge district courts had "both found, without objection from defendants, that constitutional violations were ongoing" in July 2007, and "defendants ha[d] never filed a motion to terminate under § 3626(b), the proper means for any challenge to the existence of 'current and ongoing' constitutional violations." *Id.*

The three-judge court's reasoning is unsound. The State's failure to dispute whether violations were ongoing approximately *sixteen months prior to trial commencing before the three-judge court* says little about the state of the alleged constitutional violations at the time of trial, let alone at the time of the August 4, 2009 order. Indeed, the justification of the court below is especially flawed given that the State had been working with the Special Master and Receiver in the interim, and Assembly Bill 900, which, among other things, authorized funding for new prisons, was not signed into law until May 2007. Furthermore, although the State had not moved to terminate proceedings on the basis that *all* constitutional violations had been remedied, the lack of such a

motion does not answer whether some violations had been cured and what measures might be necessary to address any remaining violations.

Nonetheless, throughout the proceedings before the three-judge court, the State was prohibited from gathering and introducing evidence to counter the plaintiffs' argument that crowding is—in the present tense as the PLRA requires—the primary cause of the violation of a federal right. See 18 U.S.C. § 3626(a)(3)(E)(i).[8] Because the three-judge court failed to focus on "current and ongoing violations" and the causes of any such violations, its determination that crowding is the "primary cause" of those violations is meaningless and cannot satisfy the PLRA.

For example, the court prevented the State from showing that the previously existing federal violations had been mitigated or even remedied in the interim by measures directed at other causes. In turn, this meant that the State was unable to refute the claim that crowding was the primary cause of those violations. Similarly, had the State been permitted to develop and present evidence that previously existing unconstitutional conditions had been mitigated or extinguished by measures short of "prisoner release," it would have dispelled the notion that "less intrusive" measures could not remedy any remaining violations. Instead, the three-judge court

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[8] For instance, during trial, the court repeatedly ruled that evidence would not be allowed to prove current constitutional conditions. *See, e.g.*, Pre-Trial Hr'g Tr. at 28:16-29:2 (E.D. Cal./N.D. Cal. Nov. 10, 2008) (*Plata* Docket No. 1786); Trial Tr. at 6:24-7:9 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Plata* Docket No. 1829); Trial Tr. at 57:11-58:13 (prohibiting intervenor counsel's opening statement from continuing when he attempted to address the issue of current constitutionality).

made its "primary cause" determination without considering current conditions. Its findings thus cannot support the wide-ranging prospective relief imposed here, and, at a minimum, the issue warrants plenary review by this Court.

III. THE COURT'S INTERPRETATION OF THE PLRA'S NEXUS AND NARROW TAILORING REQUIREMENTS IS DEEPLY FLAWED.

Even if Section 3626(a)(3)(E) were satisfied, the scope of the court's release order and cap raise substantial questions worthy of this Court's attention.

The court's order imposes an inflexible population cap, 137.5% of the prisons' design capacity, that must be met within two years, meaning that California's overall prison population must be reduced by approximately 46,000 inmates. App. 169a, 235a, 255a. The PLRA, however, commands that no prospective relief, including a prisoner release order, may be entered unless it "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3826(a)(1)(A). Any such relief may "extend no further than necessary to correct the violation of the Federal right of *a particular plaintiff or plaintiffs*." *Id.* (emphasis added). In assessing these requirements, the court also "shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

The prisoner release order imposed here violates these nexus and narrow tailoring requirements, fails to heed this Court's teachings about the cabining of federal courts' powers over prison reform, and

improperly minimizes the potential adverse impact on public safety. But cf. App. 168a-185a (holding PLRA's narrow tailoring requirements were met); *id.* at 185a-255a (finding no unduly adversely impacts to public safety or the criminal justice system).

1. The three-judge court readily acknowledged that "the relief sought by plaintiffs extends further than the identified constitutional violations" insofar as it "is likely to affect inmates without medical conditions or serious mental illnesses." App. 172a. That is, the population cap applies to the prison population as a whole, not merely to members of the *Coleman* and *Plata* classes. On its face, therefore, the relief is not "narrowly drawn" and is broader than necessary to "correct the violation of the Federal right of ... particular ... plaintiffs," *i.e.*, the class members. 18 U.S.C. § 3626(a)(1)(A).

The decision of the three-judge court conflicts with the PLRA and is in tension with other courts' recognitions of the necessity of narrowly tailored relief. See *Hines* v. *Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (affirming termination of decree as "not narrowly drawn" under the PLRA because it addressed medical care generally, not "a particular medical problem that existed at the time"); see also *Women Prisoners*, 93 F.3d at 931 (discussing overbreadth under the PLRA); H.R. Rep. No. 104-21, at 24 n.2 (1995) ("By requiring courts to grant or approve relief constituting the least intrusive means of curing an actual violation of a federal right, the provision stops judges from imposing remedies intended to ... provide an overall improvement in prison conditions."). Furthermore, it violates equitable principles repeatedly emphasized by this Court: "'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does

not violate the Constitution or does not flow from such a violation.'" *Missouri* v. *Jenkins*, 515 U.S. 70, 98 (1995) ("*Jenkins II*"); cf. *Casey*, 518 U.S. at 350.

Moreover, by directing the prisoner release order at *all* prisoners in California, the relief constitutes a substantial intrusion on the State's overall management of its criminal justice system, particularly with respect to CDCR. This interference flatly contravenes Section 3626(a)(1)(A)'s requirement that the court "give substantial weight to any adverse impact on ... the operation of the criminal justice system." See also 141 Cong. Rec. S2647, S2649 (daily ed. Feb. 14, 1995) (Sen. Hutchison) ("This bill will curb the ability of Federal courts to take over the policy decisions of State prisons ...."); cf. *Casey*, 518 U.S. at 364 (Thomas, J., concurring) ("[T]oo frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree.").

Indeed, this significant invasion of the State's managerial prerogatives vis-à-vis the general prison population violates this Court's limits on the scope of equitable relief generally and in prison-conditions litigation specifically. Before the PLRA was enacted, this Court repeatedly made clear that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974), *overruled on other grounds by Thornburgh* v. *Abbott*, 490 U.S. 401 (1989); *accord*, *Turner* v. *Safley*, 482 U.S. 78, 84 (1987). Problems within the prisons are "peculiarly within the province of the legislative and executive branches of government," and special deference is owed, as here, where "state penal institutions are involved." *Martinez*, 416 U.S. at 405; *accord*, *Bell* v. *Wolfish*, 441 U.S. 520, 548 (1979);

Safley, 482 U.S. at 85; see *Rodriguez*, 411 U.S. at 491-92 ("It is difficult to imagine an activity in which the State has a stronger interest ... than the administration of its prisons."); *Casey*, 518 U.S. at 362-63. As this Court has remarked, "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." *Missouri* v. *Jenkins*, 495 U.S. 33, 51 (1990); see *Casey*, 518 U.S. at 362; *Rhodes* v. *Chapman*, 452 U.S. 337, 352 (1981).

This Court should review this case to ensure that the PLRA's requirements are given the meaning Congress intended and that courts are not left unduly free to impose prison population caps other than as a measure of last resort.

2. Beyond its impact on the general prison population, the 137.5% cap selected by the court below is not narrowly drawn.

At trial, plaintiffs sought a systemwide population cap of 130% of design capacity. App. 169a, 175a. The court weighed plaintiffs' proposed population cap against a 145% of design capacity figure that a State Independent Review Panel had discussed years earlier and within an entirely different context. *Id.* at 181a.[9] By the court's own admission, 145% of design capacity reflected an estimate of the level at

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[9] *Compare* App. 56a ("'Design capacity' is the term used . . . to designate the number of inmates a prison is designed to accommodate according to standards developed by the Commission on Accreditation and the American Correctional Association."), *with id.* at 59a ("'[O]perable capacity,' refers to 'the maximum capacity of the prisons to house inmates safely and securely while providing effective education, training, and treatment.'").

which the prisons "could 'support full inmate programming in a safe and secure environment.'" *Id.* It was not the level at which the alleged constitutional violations would be remedied, see *id.* at 183a; nor did it have a nexus to the mental health and medical treatment sought by the plaintiff classes or the other remedies proposed to improve such treatment. *Id.* at 183a-184a.

Nonetheless, the court below used the two figures as the poles by which any population cap had to be measured, and imposed the 137.5% reduction simply because it split the difference between them: "137.5% of their combined design capacity—[is] a population reduction halfway between the cap requested by plaintiffs and the wardens' estimate of the California prison system's maximum operable capacity absent consideration of the need for medical and mental health care." App. 184a ("Rather than adopting the 130% limit requested by plaintiffs, we will out of caution require a reduction in the population ... to only 137.5% of their combined design capacity ....").

This is the antithesis of narrow tailoring. Indeed, the court plucked the 137.5% figure from the record despite the lack of any nexus to the constitutional problems it was addressing, even as it acknowledged expert testimony that "the Illinois prison medical system was brought into constitutional compliance at 140% design capacity." App. 181a. Moreover, the court repeatedly focused on the cap as it related to ethereal notions of adequacy, rather than the constitutional violations alleged by the plaintiff classes. See *id.* at 177a ("[N]umerous witnesses testified that a prison system must operate *below* 100% design capacity to *function properly*.") (second emphasis added); *id.* at 179a-180a (relying on testimony criticizing the 145% figure because it "'does

not meet federal guidelines nor national standards'"); see also *id.* at 183a ("plaintiffs' experts did not calculate the extent to which the operable capacity of California's prisons exceeds the percentage necessary for the provision of constitutionally adequate medical and mental health care").

This approach conflicts with the requirements imposed by this Court and applied by the courts of appeals in assessing and remedying alleged constitutional violations. As this Court stated in *Wolfish*: "[T]he recommendations of these various [professional] groups ... simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." 441 U.S. at 544 n.27; see *Rhodes*, 452 U.S. at 348 n.13. Similarly, in striking down a court-imposed population cap pre-PLRA, the District of Columbia Circuit explained, "the obvious danger of employing professional standards as benchmarks is that they ineluctably take the judicial eye off of core constitutional concerns and tend to lead the judiciary into the forbidden domain of prison reform." *Occoquan*, 844 F.2d at 837.

3. The order also lacks any connection to the Eighth Amendment violations alleged to persist at the time of the trial before the three-judge court. Thus, it cannot satisfy the statute's nexus and narrow tailoring requirements. See *Jenkins II*, 515 U.S. at 88 ("'the nature of [an equitable] remedy is to be determined by the scope of the constitutional violation'"); see also *Hines*, 547 F.3d at 920 ("Whether an Eighth Amendment violation exists and whether the decree is narrowly tailored are independent issues."). As discussed above, *supra* Part II.2, the three-judge court prohibited the State from gathering and introducing evidence regarding "current and

ongoing" alleged violations of the Constitution. Therefore, any tailoring attempted by the court below lacked the necessary factual premise. Inquiry into the nature of the alleged current federal violations was the mandatory starting point for analyzing any nexus between the violation and the remedy, and the court failed to conduct that inquiry. Thus, the court's conclusions about the necessary scope of the remedy were without the required basis in the record and cannot stand. See *Jenkins II*, 515 U.S. at 88 ("'federal-court decrees must directly address and relate to the constitutional violation itself").

4. The court not only interfered with the operation of the State's criminal justice system, it also failed to meaningfully account for the adverse impacts on public safety that the order would cause. 18 U.S.C. § 3626(a)(1)(A). A core purpose of the PLRA was to ensure that any prisoner release order provided substantial protection to the public. See *id.*; see also H.R. Rep. No. 104-21, at 9; 141 Cong. Rec. at S14418 (Sen. Hatch). The court's order requiring that the prison population be reduced by 46,000 inmates over two years does not offer sufficient protection to the public.

The three-judge court candidly acknowledged that crime was likely to increase without substantial investment in "evidence-based rehabilitation programming," App. 241a-248a—"*i.e.*, programs that research has proven to be effective in reducing recidivism," *id.* at 214a; see *id.* at 200a. However, the court did not find that such programming could be expanded or calculate the costs of expanding such programming. No evidence was presented on these points, and in light of the State's weak financial condition, it is unlikely that such programming could be made available. The three-judge court recognized

that "California has reduced spending on education, health care, the social safety net, and services for the needy, the blind, and children to the breaking point." *Id.* at 11a n.4. The court also noted that already-strained county resources would be further impacted by a prisoner release because the released inmates will displace other people currently receiving county services. *Id.* at 187a.

Nonetheless, the three-judge court simply asserted that "there are a number of population reduction measures that will not have an adverse impact on public safety ... all of which have been previously recommended to the state, in various reports, by experts it retained to examine ways to reduce California's high recidivism rate." App. 186a; but see App. 317a (concluding that the State could not safely reduce the prison population to 137.5% of design capacity within two years). The court did not address, and took no evidence concerning, the State's ability to provide the programming that the court believed was necessary to safely reduce the prison population. And considering the State's serious financial issues, it is impossible to know what resources the State will have available to provide services that released inmates would need. See generally *id.* at 328a n.10, 341a-342a (conditioning plan to reduce population on various measures by the legislature). Therefore, the court's order raises substantial questions about whether Section 3626(a)(1)(A) has been satisfied.

The court below has entered an unprecedented order that carries with it unparalleled intrusions into the ability of the State to respond to problems not only within its prison system, but also more broadly throughout California. Essentially a federal court has dictated to the State an ambitious agenda to

reform its prison system to meet a target that the court selected, at the expense of other pressing needs that the State must confront.

Congress recognized the federalism concerns inherent in such an order and accordingly required appellate review by this Court. Every issue decided by the court below is an issue of first impression. This alone provides a sufficient basis for this Court to note probable jurisdiction. But what makes the need for review particularly acute is that the court below has provided a roadmap for every court that is frustrated with the pace of judicial remedies in prison litigation simply to throw up its hands and use prisoner release as the default option. That is completely at odds with Congress's intent and demands this Court's plenary review.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

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*Counsel of Record